UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CARLOS FABARA,

Plaintiff,

REPORT AND RECOMMENDATION

-against-

13-CV-2619 (SJ)

U.S. SECURITY ASSOCIATES, INC., et al.,

Defendants.
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ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:

On March 7, 2013, plaintiff Carlos Fabara ("Fabara," or "plaintiff") filed this action in the Supreme Court of the State of New York, in Queens County. See Complaint, attached to Notice of Removal (Apr. 30, 2013) ("Compl."), ECF Docket Entry ("DE") #1. The Complaint seeks damages allegedly sustained by Fabara after he was arrested by Thierry Gokoba ("Gokoba"), a private security guard employed by U.S. Security Associates, Inc. ("U.S. Security"), while in Philadelphia, aboard a bus operated by Greyhound Lines, Inc. ("defendant" or "Greyhound") and driven by John Manigault. See generally Compl. Plaintiff complains of false arrest, negligence, and intentional infliction of emotional distress, and asserts that defendants U.S. Security and Greyhound are vicariously liable by virtue of the doctrine of *respondeat superior*, as well as for negligent hiring, screening, and supervision. See id.

Plaintiff claims that, in relation to his false arrest and negligence claims, he suffered "great emotional stress and upset and psychological and physical consequences causing great pain of body and mind and also resulting in monetary loss." Compl. ¶¶ 25, 30, 48, 53.

Additionally, stemming from all claims, plaintiff asserts, "*inter alia*[,] physical injuries, emotional distress, embarrassment, and humiliation, and deprivation of his constitutional rights as well as severe penalties imposed upon him by his employer, the New York City Police Department." Compl. ¶¶ 26, 31, 40, 49, 54. Rather than stating a specific amount of damages, the Complaint seeks damages "in a sum which exceeds the jurisdictional limit[s] of all lower [state] [c]ourts which would otherwise have jurisdiction," as well as costs and disbursements. Compl., *ad damnum* clause.

On April 30, 2013, Greyhound filed a notice of removal in the Eastern District of New York (the "Removal Notice"), asserting jurisdiction based on diversity of citizenship, pursuant to 28 U.S.C. § 1332.[1] See Removal Notice (Apr. 30, 2013) ¶¶ 3-10, DE #1. In the Removal Notice, defendant states, without providing additional detail, that "[t]he amount in controversy is in excess of $75,000." Id. ¶ 10. Not satisfied that defendant had therewith sustained its burden of demonstrating that the $75,000 jurisdictional threshold necessary to support diversity jurisdiction had been met, see 28 U.S.C. § 1332(a); Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994), this Court issued an order on May 2, 2013, directing defendants to show cause why this case should not be remanded to state court for lack of federal jurisdiction. See Order re Notice of Removal (May 2, 2013), DE #4. Defendant responded to the Court's Order in a letter filed on ECF on May 6, 2013, explaining that "Greyhound believes on the basis of plaintiff's allegations that the amount in controversy is in excess of $75,000."[2] 5/6/13 Letter.

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[1] While the Court does not reach the issue of whether Greyhound's method of obtaining consent from the other defendants in this litigation complies with 28 U.S.C. § 1446(2)(A), Greyhound's statement in the Removal Notice that "[a]ll defendants who have been served have consented to the removal of this action" appears insufficient. See Removal Notice ¶ 12. Courts in this Circuit require that multiple defendants seeking to remove comply with the "rule of unanimity," which requires that all consenting defendants file with the Court a submission (or submissions) indicating "unambiguous" written consent. See Codapro Corp. v. Wilson, 997 F.Supp. 322, 325-26 (E.D.N.Y. 1998) (defendant failed to obtain effective consent of all defendants where notice of removal "purport[ed] to act on behalf of all the served defendants, [yet] none of the other defendants signed the notice . . . [and] none of the other defendants . . . filed anything in [that] Court, much less the [required] separate 'pleading' manifesting their consent . . . .").

For the reasons that follow, the Court concludes that Greyhound has not met its burden of demonstrating that federal jurisdiction exists in this action, and respectfully recommends that the case be remanded to state court.

DISCUSSION

A civil action filed in a state court may be removed by a defendant to federal district court if the district court has original subject matter jurisdiction over the claims in the complaint. See generally 28 U.S.C. § 1441. If at any time during a litigation a court discovers that it does not have subject matter jurisdiction, "the case shall be remanded." 28 U.S.C. § 1447(c).

A defendant seeking to remove a case from state to federal court on the basis of diversity jurisdiction has the burden of showing that there is "a 'reasonable probability' that the claim[s are] for more than the jurisdictional amount" of $75,000. See Am. Standard, Inc. v. Oakfabco, Inc., 498 F.Supp.2d 711, 717 (S.D.N.Y. 2007) (citing Tongkook Am., Inc. v.

[2] Defendant went on to state that "[i]f plaintiff will stipulate that the amount in controversy is less than $75,000, Greyhound will consent to the remand of this case to state court." Letter to Judge Mann (May 6, 2013) ("5/6/13 Letter"), DE #5. The absence of such a stipulation does not, without more, cure the jurisdictional defect. See 28 U.S.C. § 1447(c).

Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994)); see also Pollock v. Trustmark Ins. Co., 367 F.Supp.2d 293, 296 (E.D.N.Y. 2005). A removing defendant must "establish its right to a federal forum by competent proof," Audi of Smithtown, Inc. v. Volkswagen of Am. Inc., No. 08-CV-1773 (JFB)(AKT), 2009 WL 385541, at *3 (E.D.N.Y. Feb. 11, 2009) (citation omitted), proffering "facts necessary to show jurisdiction." Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 298 (2d Cir. 2000) (quoting McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936)); see also Lupo, 28 F.3d at 273-74. Accordingly, the burden of proof has not been met where a defendant levels "mere conclusory allegations" about the "indirect or speculative value" of the claims in a case. See Am. Standard, 498 F.Supp.2d at 718 (internal citation omitted). Finally, "removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." Id. at 715 (internal citation omitted); see also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Lupo, 28 F.3d at 274 (citing Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991)).

In Lupo, the Second Circuit held that "if the jurisdictional amount is not clearly alleged in the plaintiff's complaint, and the defendant's notice of removal fails to allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount, federal courts lack diversity jurisdiction as a basis for removing the plaintiff's action from state court." Lupo, 28 F.3d at 273-74. The Circuit subsequently clarified, in Mehlenbacher, that, in determining whether the jurisdictional threshold has been met, courts are not limited to the allegations contained in the pleadings alone; the "reasonable probability" requirement may be satisfied by competent evidence outside of, or in combination with, the pleadings. See

Mehlenbacher, 216 F.3d at 298 & n.11. Accordingly, a "court looks first to the complaint, and then to moving papers, and then to anything else" in the record. See Pollock, 367 F.Supp.2d at 297 (citing United Food & Comm. Workers Union, Local 919, AFL-CIO v. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994)); see, e.g., NSI Int'l, Inc. v. Mustafa, No. 09-CV-1536 (JFB)(AKT), 2009 WL 2601299, at *7, *9-10 (E.D.N.Y. Aug. 20, 2009); Yonkosky v. Hicks, 409 F.Supp.2d 149, 157-58 (W.D.N.Y. 2005).

In this case, the Complaint does not clearly state that plaintiff's damages exceed the jurisdictional threshold; indeed the Complaint does not state a specific sum at all, although, by reference to the jurisdictional limits of "lower" state courts, it alleges at least $25,000 in damages. See Compl., *ad damnum* clause; N.Y. City Civ. Ct. Act § 202; Woodley v. Mass. Mutual, No. 08 Civ. 0949(NRB), 2008 WL 2191767, at *2 (S.D.N.Y. May 23, 2008). Although defendant's Removal Notice conclusorily states that the amount in controversy "exceeds $75,000," the Removal Notice does not allege facts to support that conclusion. Moreover, the 5/6/13 Letter – the only other submission filed in support of the Removal Notice – also fails to allege facts to support defendant's belief (based solely on the allegations in the Complaint) that plaintiff sustained over $75,000 in damages. Finally, the Complaint alone provides insufficient detail to permit the Court to "intelligently ascertain" the amount in controversy in this case. See Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 205-06 (2d Cir. 2001) (citation omitted).

For the foregoing reasons, Greyhound has not met its burden of demonstrating that there is federal jurisdiction, and the Court respectfully recommends that this case be remanded to state court.[3] See, e.g., Audi of Smithtown, 2009 WL 385541, at *8 ("reasonable probability" standard not satisfied where complaint alleged damages of "not less than" $50,000 and defendants offered only conclusory statements of belief about the value of plaintiff's claims); 22nd St. Springfield Corp. v. United States Liab. Ins. Grp., No. CV 08-0692 (RJD)(JO), 2008 WL 510408, at *2 (E.D.N.Y. Feb. 22, 2008) (even though pleading alleged "serious personal injuries" suffered in car accident, and court could "infer from the allegations" that "substantial" amount was at issue, burden not met where no monetary amount stated in pleadings and defendant failed to do more than conclusorily assert existence of diversity jurisdiction in removal notice); Yonkosky, 409 F.Supp.2d at 157-58 ("reasonable probability" not established where complaint stated no monetary amount and defendant did not submit evidence to support its conclusion, based on allegations in complaint, that damages would exceed $75,000, even though complaint alleged "severe, permanent and painful injuries," and economic losses due to incapacity to work and medical expenses); see also Battaglia v. Penske Truck Leasing Co., No. 08-CV-2623 (SLT)(SMG), 2008 WL 2946009, at *2 (E.D.N.Y. July 29, 2008); Woodley, 2008 WL 2191767, at *2 & n.3 (collecting cases); Kaur v. Levine, No. CV 07-0285(FB)(JO), 2007 WL 210416, at *2 (E.D.N.Y. Jan. 26, 2007); cf. NSI Int'l, 2009 WL 2601299, at *7-10 (pleadings alone did not establish jurisdictional threshold although additional evidence provided by defendant supported conclusion that amount in controversy exceeded $75,000); MBIA Ins. Corp. v. Royal Bank of

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[3] Plaintiff seeks the same damages for all of his claims and, to the extent that the damages alleged are duplicative, they cannot be aggregated for the purposes of determining the amount in controversy. See Pollock, 367 F.Supp.2d at 301.

Canada, 706 F.Supp.2d 380, 391 (S.D.N.Y. 2009).

Any objections to this Report and Recommendation must be filed with the Honorable Sterling Johnson, Jr., by **June 3, 2013**. Failure to file timely objections may waive the right to appeal the District Court's Order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989). The Clerk is requested to docket this Report and Recommendation into the ECF system.

SO ORDERED.

Dated: Brooklyn, New York
May 17, 2013

/s/ Roanne L. Mann

ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE